United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1422

To be argued by
PETER D. SUDLER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1422

B P/S

UNITED STATES OF AMERICA,
Appellee,

—v.—

FRANK CARUSO, MICHAEL DiRIENZO, EMIL ANNATONE, ROBERT D'ADDARIO, JOSEPH MESSINA and MICHAEL DITURI,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES AND OTHER AUTHORITIES

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Frank Caruso, Michael DiRienzo, Emil Annatone, Robert D'Addario, Joseph Messina and Michael Dituri appeal from judgments of conviction entered on September 20, 1976, in the United States District Court for the Southern District of New York after pleas of guilty before the Honorable Milton Pollack, United States District Judge.*

Indictment 75 Cr. 1157, filed November 25, 1975, in two counts, charged Frank Caruso, Robert D'Addario, Michael Dituri, Michael DiRienzo, a/k/a "The Fish," Andrew Di Simone, Joseph Bugliarelli, a/k/a "Blue," Joseph Messina, Daniel Latella, Carmine Gagliano, Emil Annatone and Leo Faranda in Count One with conspiring to conduct an illegal gambling business in violation of Title 18, United States Code, Section 371. Count Two

* The defendants pled guilty subject to the express condition that they be allowed to preserve for appeal the denial of their pre-trial motions to suppress evidence derived from three Federal wiretaps. This procedure has been approved by this Court. *United States* v. *Mullens*, 536 F.2d 997 (2d Cir. 1976); *United States* v. *Bronstein*, 521 F.2d 459, 460 (2d Cir. 1975).

charged the same defendants with conducting an illegal gambling business in violation of Title 18, United States Code, Section 1955.

Between July 1, 1976 and August 23, 1976 Michael Dituri, Frank Caruso, Robert D'Addario, Daniel Latella, Emil Annatone, Joseph Messina, Leo Faranda and Michael DiRienzo entered guilty pleas to Count Two of the indictment. Orders of nolle prosequi with respect to Andrew DiSimone, Joseph Bugliarelli and Carmine Gagliano were filed with the District Court on September 3, 1976 after it was determined that their voices were not those previously thought to have been intercepted on three federal wiretaps. Leo Faranda and Daniel Latella have not appealed.

On September 20, 1976, Judge Pollack sentenced Frank Caruso to two years imprisonment with execution of one year suspended and a $2,000 fine. Emil Annatone was sentenced to two years imprisonment with execution of all but four months suspended and a $2,000 fine. Robert D'Addario was given a suspended sentence, two years probation and fined $1,000. Michael Dituri was sentenced to two years imprisonment with execution of all but two months suspended and fined $1,500. Joseph Messina was sentenced to two years imprisonment with execution of all but two months suspended and fined $2,000. Michael DiRienzo was sentenced to two years imprisonment with execution of all but one month suspended and fined $1,500.

The defendants are at liberty on bail pending this appeal.

Statement of Facts

During the period from October 1973 through June 1974, the Bronx County District Attorney's Office, in conjunction with the New York City Police Department conducted a series of eight wiretaps in an effort to develop evidence against a large gambling combine

operating in New York and Bronx Counties.* (App. 397-402).** While this investigation began solely as

* A listing of the pertinent information related to each of the eight New York State wiretaps is set forth below:

Date Issued	*Date Terminated*	*Date Sealed*	*Issuing Supreme Court Justice*	*Delay in Sealing*	*Hereinafter Referred to as*		*Appellants Intercepted*
Sept. 18, 1973	—	Oct. 18, 1973	Roberts	—	Blackman	"wiretap"	None
Oct. 26, 1973	Nov. 25, 1973	Jan. 7, 1974	Sullivan	43 days	Whalen I	"wiretap"	None
Nov. 12, 1973	Nov. 25, 1973	Jan. 7, 1974	Bloom	43 days	Whalen II	"wiretap"	None
Nov. 28, 1973	Dec. 13, 1973	Jan. 11, 1974	Bloom	24 days	Salome	"wiretap"	None
Dec. 10, 1973	Jan. 8, 1974	Feb. 1, 1974	Bloom	24 days	Social Club	"wiretap"	Dituri
Jan. 5, 1974	Feb. 7, 1974	Mar. 21 1974	Bernstein	42 days	G & D	"wiretap"	Dituri, D'Addario
Apr. 22, 1974	May 21, 1974	May 23, 1974	Chananau	2 days	Vacarelli	"wiretap"	Caruso, Dituri
June 11, 1974	June 30, 1974	July 1, 1974	Hughes	2 days	Faranda	"wiretap"	Caruso, Dituri, and D'Addario

** The abbreviation "App." refrs to the appellants' joint appendix. "Br." refers to the brief of the designated defendant.

a state law enforcement effort, it became a joint investigation when, in mid-April 1974, it was ascertained that the Federal Bureau of Investigation was pursuing a parallel course. (App. 488). The state and federal efforts then merged. Thereafter, the Bronx District Attorney's Office conducted the last two of the eight state wiretaps, ("Vacarelli" and "Faranda"). (App. 384).

In July 1974, the first of three federal electronic surveillances began,* and ended in October 1974, when various premises used in the gambling combine's operation were raided. In November, 1975 the defendants were indicted and each filed pre-trial motions on a variety of grounds all of which were withdrawn except for the two presented on this appeal, namely, untimely sealing of the state tapes and the insufficiency of the affidavit submitted in support of the federal wiretap application. (App. 567).

On June 22, 1976 Judge Pollack held a hearing with respect to the defense motions. Before taking testimony the court simplified the issues by having the Government and defense counsel designate the issues in dispute. The Government represented that it intended to offer at trial only tapes obtained under the federal wiretaps, but that applications for the federal wiretaps made use of information obtained in the state wiretaps. All parties agreed that only four of the eight state wiretaps had resulted in interceptions of any of the defendants. (App.

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* The three Federal wiretaps were (1) the "Expresso wiretap" (issued by Judge Ward on July 11, 1974, terminated on July 30, 1974 and sealed on July 31, 1974), (2) the "Roosewood wiretap" (issued by Judge Owen on August 15, 1974, terminated on September 9, 1974 and sealed on September 10, 1974), and (3) the "Roosewood renewal wiretap" (issued by Judge Motley on September 24, 1974, terminated on October 13, 1974 and sealed on October 23, 1974).

398-99). Of these four state wiretaps, two ("Vacarelli" and "Faranda") were promptly sealed and thus not contested on the grounds of a sealing delay. As to the remaining two state wiretaps, there were claims of late sealing resulting from a 24 day delay with respect to the "Social Club" wiretap and a 42 day delay with respect to the "G & D" wiretap. Three defendants were intercepted on the "G & D" wiretap; one defendant, Dituri, was intercepted on the "Social Club" wiretap. (App. 399-402).

To explain the delay in sealing the "G & D" and "Social Club" tapes, the Government presented the testimony of John J. Breslin, Chief of the Rackets Bureau of the Bronx District Attorney's Office at the time of the eight state wiretaps. (App. 440-86). Mr. Breslin testified that as the Chief of the Rackets Bureau in the Bronx District Attorney's Office he was responsible for the general supervision of the investigation in which the state electronic surveillances were conducted. (App. 441). Specifically Mr. Breslin supervised Assistant District Attorneys Kaplan and Carroll who, in turn, were both charged with the responsibility of having the tapes sealed.

With respect to the "Social Club" wiretap, Mr. Breslin testified that the wiretap was terminated on January 8, 1974 and sealed on February 1, 1974. (App. 441-42). He accounted for the 24 day hiatus as follows: from January 8 until January 29, 1974 the tapes were in the possession of the New York City Police and were being duplicated. (App. 442). The tapes were turned over to the District Attorney's Office on the 29th of January and were sealed on February 1, 1974, only three days later. During the 24 day period there were internal discussions within the District Attorney's Office concerning whether the interception should be continued or whether a different form of electronic surveillance (a "bug") should be utilized.

With respect to the "G & D" wiretap, Mr. Breslin testified that the order issued by Justice Bernstein on January 24, 1974 was terminated on February 7, 1974. The tapes were then brought to the District Attorney's Office on February 11, 1974 by the Police Department and sealed on March 21, 1974. (App. 433-44). Mr. Breslin explained the delay, amounting to 42 days, as having resulted in large part from an internal dispute which had arisen between the Police Department and the District Attorney when it was discovered that the targets of the interception had learned of the existence of the wiretap and had discontinued their operation over the telephone lines. (App. 445). When the leak was discovered, an internal investigation ensued. Assistant District Attorney Carroll, who had been assigned to the investigation, was taken off the case and assigned to his first trial. This investigation was assigned to another Assistant District Attorney who ultimately had the tapes sealed. (App. 447, 450-53).

Following Breslin's testimony, the Government called Special Agent Julius Bonavolonta, of the Federal Bureau of Investigation, who testified about the procedures employed in sealing of the tapes resulting from the federal wiretaps. (App. 492-94), (No issue is raised on appeal relating to the sealing of those tapes). Agent Bonavolonta also testified that a small portion of the information presented in the application for the "Expresso" wiretap came from records and information derived from the "G & D" and "Social Club" taps. (App. 488-91). Agent Bonavolonta stated that there was no benefit obtained by the Federal Government because of the sealing delays in either the "G & D" or "Social Club" tapes. (App. 490).

On July 1, 1976, by memorandum opinion, Judge Pollack denied the motions to suppress the evidence ob-

tained through the three federal wiretaps. (App. 565-78). The Judge found that only three of the defendants (D'Addario, Dituri and Faranda) even had standing to contest the late sealing of the "G & D" and "Social Club" taps and that the delays in sealing were satisfactorily explained. (App. 571). Judge Pollack further found that even if there were no satisfactory explanation for the late sealing of the "G & D" and "Social Club" tapes, the portion of the probable cause provided from those two sources was so minor that even without that information, there had been probable cause for the issuance of the federal wiretap orders. (App. 573-74). With respect to the second issue raised on this appeal, Judge Pollack found that the affidavits in support of the federal wiretaps adequately explained why traditional investigative techniques would be unlikely to succeed. (App. 574-78).

ARGUMENT

POINT I

The Federal Wiretapping Orders Were Supported by Ample Probable Cause Apart from the Information Derived from the State Wiretaps Challenged on the Grounds of Late Sealing.

The main issues presented upon this appeal revolve around claims of sealing delays in state wiretaps utilized in the affidavit for the first federal wiretap, the "Expresso" wire. Questions of standing and interpretation of both the state and federal wiretap statutes are avidly contested by all sides. However, none of these need be reached because even assuming that all of the defendants had standing and had a legally sufficient basis to contest the federal wiretaps, the federal wiretaps should not be

suppressed because, as Judge Pollack found, there was ample probable for issuing the federal wiretap orders without reference to the information derived from the challenged state wiretaps.

As a proposition of law, it is clear that the presence of improperly obtained information will not invalidate the wiretap orders if there was probable cause without reference to the claimed illegality. *United States* v. *Koonce*, 485 F.2d 374 (8th Cir. 1973). See also *Howell* v. *Cupp*, 427 F.2d 36 (9th Cir. 1970); *United States* v. *Sterling*, 369 F.2d 799 (3d Cir. 1966). As Judge Weinfeld stated in *United States* v. *Epstein*, 240 F. Supp. 80, 82 (S.D.N.Y. 1965):

> "There is authority, and none to the contrary that when a warrant issues upon an affidavit containing both proper and improper grounds, and the proper grounds—considered alone—are more than sufficient to support a finding of probable cause, inclusion of the improper grounds does not vitiate the entire affidavit and invalidate the warrant."

The District Court found, based on its examination of the affidavits and information submitted in support of the federal wiretap orders, that neither the contested "G & D" nor the "Social Club" tap "was necessary to the establishment of probable cause on which such orders issued." (App. 574). Judge Pollack went on to say that:

> "The federal tapes do not constitute evidence derived from the state taps at issue here. While the application for the federal wiretap orders relied almost exclusively on information obtained from the prior state intercepts, the two intercepts which the defendant Dituri has standing to challenge, and the single intercept which the defendants D'Addario and Faranda may challenge, played a minor role in the applications." (App. 573).

A careful examination of the affidavits in support of the three federal wiretaps shows this finding to have been solidly grounded.

The first federal wiretap application sought authorization to tap the telephone at a luncheonette called "Mike's Expresso," (212) 547-8607. The affidavit in support of the "Expresso" wiretap, submitted by Special Agent Bonavolonta on July 11, 1974, demonstrated probable cause to believe that the phone at Mike's Expresso was being used for violations of the gambling statute, 18 U.S.C. § 1955. (App. 174-215). The information which furnished the probable cause derived from three sources: information taken from state wiretaps; physical surveillances; and informant information. These sources were supplemented by background information on individuals and places taken from official police and FBI records.

First, as to wiretap information (excluding information derived from the "G&D" and "Social Club" taps), the "Expresso" affidavit detailed the results of electronic surveillance of the phone at Leo Faranda's grocery store (the "Faranda" wiretap) which included calls to the telephone at Mike's Expresso in the period of June 1974. (App. 211-214). The "Expresso" affidavit attested that 132 pertinent telephone calls were made to the phone at Mike's Expresso. These interceptions included conversations between Leo Faranda and Michael Dituri and other unknown individuals concerning monies wagered, amounts owed to or by bettors and other participants in the gambling business, the results of the previous day's betting, the accuracy of records maintained in the gambling operation, and the "line" or odds on various bets. (App. 212). It was these 132 telephone conversations, fruits of the "Faranda" wiretap (one of those state taps not contested on grounds of sealing delay), which formed the heart of the probable cause of the "Expresso" wiretap. Further

electronic surveillance resulting from the "Faranda" wiretap showed outgoing calls to Louis' Expresso Shop wherein Louis Vacarelli received the daily "line" on various sporting events from an unidentified male known as Johnny. (App. 213).

Paragraph 11 of the "Expresso" affidavit detailed numerous physical surveillances of the premises of Mike's Expresso, 3607 Bronxwood Avenue, Bronx, New York. (App. 191-92). These surveillances showed the premises to be visited regularly by Frank Battista, Santa Tantillo, and Leo Faranda between the hours of 7:00 P.M. and 9:30 P.M., a time when the luncheonette was closed. Each of these individuals, who were known to have numerous gambling arrests was seen placing envelopes through the mail slot on numerous occasions from April 24, 1974 through June 25, 1974 after closing hours.*

From these materials it is evident that, exclusive of the "G & D" and "Social Club" wiretaps, the affidavit in support of the Expresso wire contained more than sufficient information to demonstrate that there was probable cause to believe that a violation of 18 U.S.C. § 1955 was occurring and that the Expresso telephone, (212)

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* In addition, the "Expresso" affidavit detailed information given by Mr. A, a reliable confidential informant who had, in the past, given the FBI information which had resulted in over 150 arrests (App. 250-06). Mr. A stated that a major gambling operation, headed by Gaetano Somma and Aldo Mazzarati, was being conducted in the Bronx. Frank Caruso was said to be a major figure in the operation. Mr. A advised that he had observed and overheard in a Bronx bar several known gamblers, including Benjamin DeMartino, Frank Caruso, Emil Annatone, Gaetano Somma, and Aldo Mazzarati, discussing "plays and money" and "the figures." Mr. A observed Frank Caruso showing an unidentified individual an adding machine tape and saying something to the effect that there was a short. (App. 206).

547-8607, was being utilized in furtherance of that violation. The "Rosewood" and the "Rosewood Renewal" affidavits (the second and third federal wiretaps) established probable cause largely on the basis of the fruits obtained in the "Expresso" wiretap. No information which resulted from the two contested state taps, "G & D" & "Social Club," was utilized to obtain either the "Rosewood" or "Rosewood Renewal" wiretaps. As to the Expresso wire, Judge Pollack correctly concluded that probable cause existed apart from the minor information supplied from the "G & D" and "Social Club" wiretaps.*

POINT II

Under Both the State and Federal Wiretap Statutes, Sealing Is Not A Prerequisite to Use of the Contents of Intercepted Communications for the Purpose of Establishing Probable Cause.

Again assuming *arguendo* that all of the defendants had standing, the motions to suppress were properly denied because the wiretap statutes, both state and federal, do not require the presence of a seal where, the contents of wiretaps are disclosed merely for the purpose

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* The information contained in the "Expresso" affidavit which derived from the "Social Club" and "G & D" wiretaps included conversations which generally pertained to the daily operation of the illegal gambling business at those locations. These conversations took place mostly betwen Michael Dituri and Louis Vaccarelli, in the case of the "G & D" tap, and between Frank Battista and Michael Dituri, in the case of the "Social Club" tap. The conversations were summarized in the affidavit and typical individual conversations of each were set forth at length. (App. 179-84, 193-96). The information derived from the "G & D" and "Social Club" taps did not relate directly to the telephone at Mike's Expresso and therefore could not have furnished the probable cause for that wiretap order.

of establishing probable cause. Although the District Court did not accept this argument, we submit that the statutory provisions make this clear.

The pertinent state and federal provisions, though worded differently, are essentially the same. The applicable statutory sections require that a seal must be present, or the absence thereof adequately explained, whenever wiretap evidence is to be used in giving testimony in a criminal proceeding or before a grand jury. However, if the contents of wiretaps are revealed by law enforcement officers in the course of their official duties, the sealing requirement does not apply.

The relevant sections of the New York State statute are N.Y.C.P.L. §§ 700.65(2) and (3). Subsection (3) requires a seal when evidence from a wiretap is used in criminal or grand jury proceedings, as follows:

> "Any person who has received, by any means authorized by this article, any information concerning a communication, or evidence derived therefrom, intercepted in accordance with the provisions of this article, may disclose the contents of that communication or such derivative evidence while giving testimony under oath in any criminal proceeding in any court or in any grand jury proceeding; provided, however, that the presence of the seal provided for by subdivision two of section 700.50, or a satisfactory explanation of the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any communication or evidence derived therefrom."

No such requirement of a seal is found in the provision permitting use of the contents of wiretaps by law enforcement officers performing official duties. To that effect, subsection (2) provides as follows:

> "Any law enforcement officer who, by any means authorized by this article, has obtained knowledge of the contents of any intercepted communication, or evidence derived therefrom, may use such contents to the extent such use is appropriate to the proper performance of his official duties."

The parallel federal provisions are found in 18 U.S.C. §§ 2517(2) and (3) and § 2518. Under § 2518 the presence of a seal is "a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517." Turning to § 2517(3), we learn that the seal is required, again, only if the evidence is disclosed through testimony in criminal or grand jury proceedings. Thus, § 2517(3) provides as follows:

> "Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding."

Again, no sealing requirement is imposed for "use" by a law enforcement officer performing official duties. To this effect, § 2517(2) provides, as follows:

> "Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties."

The legislative history of the federal statute makes clear that § 2517(3) is directed at the use of wiretap evidence at proceedings such as trials. Thus, as to that section, the Senate Report stated that it authorizes disclosure by a person "giving testimony. It envisions, of course, the use and disclosure of such evidence at trial to establish guilt directly . . ., or to corroborate . . ., or to impeach . . . a witness' testimony or to refresh his recollection. . . ." S. Rep. No. 1097, 90th Cong. 2d sess. (1968), quoted in U.S. Code, Cong. Admin. News, 1968 at 2188-89 (citations omitted). For those uses, § 2518 explicitly requires a seal. However, no seal is necessary for use under § 2517(2) which the same Senate Report described as follows:

> "Paragraph (2) authorizes any investigative or law-enforcement officer who, by any means authorized in this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefom to use it. Only use that is appropriate to the proper performance of official duties may be made. The proposed provision envisions use of the contents of intercepted communications, for example, to establish probable cause for arrest (*Ginsberg* v. *United States*, 96 F.2d 433 (5th 1938), to establish probable cause to search (*Foley* v. *United States*, 64 F.2d 1 (5th), *certiorari denied*, 289 U.S. 762 (1933), or to develop witnesses. (*In re Saperstein*, 30 N.J. Super. 373, 104 A.2d 842 (1954), *certiorari denied*, 348 U.S. 874 (1954); *New York* v. *Saperstein*, 2 N.Y. 2d 210, 140 N.E. 2d 252 (1957). Neither paragraphs (1) nor (2) are limited to evidence intercepted in accordance with the provisions of the proposed chapter, since in certain limited situations disclosure and use of illegally intercepted communications would be appropriate to the proper performance of the officers' duties. For example,

such use and disclosure would be necessary in the investigation and prosecution of an illegal wiretapper himself. (See *United States* v. *Gris*, 146 F. Supp. 293 (S.D.N.Y. 1956), affirmed 247 Fed. 870 (2d 1957)." U.S. Code Admin. News, *supra* at 2188.*

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* Other provisions in the statutory scheme buttress the legislative history which shows an intention to create one set of requirements when wiretap evidence is used for grand jury proceedings or trials and another set when the information from wiretaps is merely being used to further an investigation. Thus, under § 2517(5), if the intercepted communications reveal a crime other than that specified in the order of authorization, that evidence *may* be disclosed *or used* by a law enforcement officer acting in his official capacity under § 2517(2). The statute limits the requirements of obtaining a subsequent order approving the previously unauthorized interception to use under § 2517(3), the provision governing use for criminal and grand jury proceedings. Section 2517(5) states these provisions as follows:

> "When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization of approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable."

A reading of this Court's opinion in *United States* v. *Marion*, 535 F.2d 697 (2d Cir. 1976), interpreting § 2517(5), makes it clear that suppression for failure to comply with this requirement was contemplated only in connection with use of the evidence at trial or in the grand jury. See also *United States* v. *Johnson*, 539 F.2d 181, 187 n. 24 (D.C. Cir.), *cert. denied*, 45 U.S.L.W. 3489 (U.S. Jan. 18, 1977); *United States* v. *Vento*, 533 F.2d 838, 854-55 (3d Cir. 1976). These cases explicitly held that an *ex parte* application for wiretap authorization fell within § 2517(2) and not within the more demanding provisions of § 2517(3).

The statute's distinction between use of unsealed evidence to establish guilt in the grand jury or at trial and use t establish probable cause is amply supported as a matter of policy. The purpose of the sealing requirement, as this Court recently explained, is to provide "an external safeguard against tampering with or manipulation of recorded evidence." *United States* v. *Gigante*, 538 F.2d 502, 505 (2d Cir. 1976). Such considerations have obvious relevance where the tapes are used to establish guilt at trial or before a grand jury. However, where a law enforcement officer communicates infomation derived from a wiretap to a judge or a magistrate in a proceeding to evaluate probable cause, the sealing requirement can have no relevance. Such a proceeding does not require production of the tapes themselves. Thus, the judicial officer relies upon the representations of the law enforcement officers and the presence or absence of a seal on the underlying tapes does not affect the integrity of such proceedings. In apparent recognition of these practicalities, and perhaps also in acknowledgement of the benefit to be derived from the unhampered use of wiretap evidence in the investigative stages of a case, the legislative scheme imposed the sealing requirement only for use of evidence in the grand jury or at trial.

Defendants attempt to engraft on the pertinent provisions of New York wiretapping statute a definition of "criminal proceeding" derived from section 1.20(18) of the New York Criminal Procedure Law.* They utilize

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* Section 1.20(18) provides as follows:
"'Criminal proceeding' means any proceeding which (a) constitutes a part of a criminal action or (b) occurs in a criminal court and is related to a prospective, pending or completed criminal action, either of this State or of any other jurisdiction, or involves a criminal investigation."

that general definitional section to contend that section 700.65(3) envisioned the presence of a seal before the contents of a wiretap would be revealed even in an *ex parte* application for a warrant. However, the use of that definitional section to arrive at that result would defeat the general purpose of the state legislation, which was to harmonize the state law with federal law on electronic surveillance. Governor's Memoranda, 1969 Session Laws at 2587-97 (May 26, 1969). From the federal legislative history it is apparent that sealing was not intended to be a prerequisite to use of information derived from wiretaps in securing arrest or search warrants. A different interpretation of the state provision would be anomalous in view of the similarity of the state and federal provisions, *United States* v. *Cirillo*, 499 F.2d 872 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974); *United States* v. *Principie*, 531 F.2d 1132, n.11 (2d Cir. 1976), and the effort of the state legislature to enact a law that would be in consonance with the federal statutes.

POINT III

The Federal Statute Does Not Permit Suppression for Late Sealing of an Earlier Wiretap Merely Used in Seeking the Wiretap Authorization. In Any Event, Only D'Addario and Dituri Have Standing to Raise the Issue.

In ruling on this matter Judge Pollack determined that only those defendants who were intercepted on the state wiretaps had standing to challenge the validity of the federal wiretaps purportedly tainted by a sealing delay in state wiretaps utilized in seeking authorization for the federal wires. The defendants excluded by that ruling—Caruso, Dirienzo, Messina and Annatone—contest that determination. We submit that Judge Pollack's posi-

tion was obviously correct and that, indeed, it can be fairly argued that the federal statute does not permit even those defendants who were overheard on the state wiretap to raise the sealing of those tapes as grounds for invalidating the federal wiretap.

A. The Federal Wiretap Statute Does Not Authorize Suppression on the Ground that Information Derived from Unsealed State Wiretaps was Utilized in the Application for Authorization.

The Government intended to offer at trial tapes obtained through federal wiretaps in which all of the appellants were overheard. There is no question but that each appellant is an "aggrieved person" within the meaning of 18 U.S.C. § 2510(11) and therefore entitled to move to suppress the tapes. However, the wiretap statute substantially circumscribes the grounds upon which an aggrieved person" may move to suppress. These grounds are enumerated in 18 U.S.C. § 2518(10)(a) as follows:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.*

Here, there can be no argument that any of the orders of authorization was "insufficient on its face" and thus subject to suppression under § 2518(10(a)(ii); nor is there an argument that the interception "was not made in conformity with the order of authorization," allowing suppression under § 2518(10)(a)(iii).** Thus, the only question is whether a federal wiretap was "unlawfully intercepted" under § 2518(10)(a)(i) where the court order permitting the wiretapping was based in part on information derived from state wiretaps as to which there was a delay in sealing.

The United States Supreme Court has interpreted the provisions of § 2518(10)(a)(i) as requiring suppression only for a "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary device." *United States* v. *Giordano*, 416 U.S. 505, 527 (1974). *Giordano* held that the failure to comply with the statutory mandate for approval of a wiretap application by the Attorney General or a specially designated Assistant did cause the interceptions to be unlawful. However, at the same time, *United States* v. *Chavez*, 416 U.S. 562 (1974) held that

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* The legislative history states that this section provides "the remedy for the right created by section 2515" and was intended to limit both sections 2515 and 2517. U.S. Code Admin. News, *supra* at 2195. *See also Gelbard* v. *United States*, 408 U.S. 41, 78-85 (1972) (dissenting opinion).

** In *United States* v. *Giordano*, 416 U.S. 505, 525 n. 13 (1974), the Supreme Court stated that (a)(iii) relates to "the manner of conducting the Court-approved interceptions."

mere misidentification of the approving official did not render the interception unlawful. Even more recently, in *United States* v. *Donovan*, 45 U.S.L.W. 4115 (U.S., Jan. 18, 1977), the Supreme Court held that failure to comply with the notice and identification requirements of the statute (§§ 2518(1)(b)(iv) and 2515(8)(d)) did not cause an interception to be unlawful requiring suppression pursuant to § 2518(10)(a)(i).

As to whether a delay in sealing makes wiretap evidence "unlawfully intercepted" under § 2518(10)(a)(i), the only court to explicitly consider the question concluded that it did not. *United States* v. *Falcone*, 505 F.2d 478 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975). Relying on legislative history that described sealing as a device to insure integrity after the intercepiton, the Third Circuit decided that a delay in sealing did not cause the communication to have been "unlawfully intercepted." After the Third Circuit's decision in *Falcone*, this Court specifically declined to determine whether a sealing delay came within the purview of § 2518(10)(a), finding instead that suppression was authorized under § 2518(8)(a) itself.* *United States* v. *Gigante*, 538 F.2d 502, 505 n.5 (2d Cir. 1976).

Whatever the availability or unavailability of the suppression remedy to challenge federal wiretaps on the ground that the tapes of those wiretaps were sealed untimely, those wiretaps are clearly not susceptible to attack on the attenuated ground advanced here, namely, that some of the information used in the application for the federal order was based on state wiretaps which were sealed untimely. Such a defect—assuming *arguendo*

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* The inapplicability of § 2518(a) as a basis for suppression on the grounds asserted in this case is demonstrated in Point II, *supra*.

that it existed—could not render the interception "unlawfully intercepted." It would not undermine "the statutorily imposed preconditions to judicial authorization. . . ." *United States* v. *Donovan*, *supra* at 4121, since sealing of wiretaps used to furnish information for the application is simply not one of those preconditions. Thus, the claim raised here is not one recognized by the federal statute as a grounds for suppressing federal wiretap evidence. On this basis alone, the claim must be rejected.

B. Even if the Issues Were Cognizable under the Federal Statute, Only Dituri and D'Addario Have Standing to Raise It.

If this Court held that a federal wiretap is "illegally intercepted" when part of the information furnished in the application derives from state wiretaps sealed untimely, only Dituri and D'Addario would have standing to raise such a claim. Dituri and D'Addario are the only two appellants whose conversations were intercepted on the state wiretaps. The other four appellants, who were not overheard on the state wiretaps and who were not the targets of the interceptions, have no standing to contest the legality of those taps.

In an effort to avoid the impact of the federal cases clearly holding that they have no standing, Caruso, Annatone, and DiRienzo argue that state law should be applied in determining whether they have standing.* Although, as will be detailed below, the result under state law is no different, standing is properly determined under federal law. In the case most analogous

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* Messina takes a different approach. He simply argues that this Court should abandon its standing requirement. (Messina Br. 7-9).

on this issue, this Court held a federal defendant had no standing to assert the illegality of a state wiretap involving conversations of third persons. *United States* v. *Garsilaso De La Vega*, 489 F.2d 761 (2d Cir. 1974). The law cited in support of that holding was *Alderman* v. *United States*, 394 U.S. 165 (1969). Thus, this Court's automatic reference was to federal law without regard to state cases on the question.*

The defendants mistakenly rely on decisions of this Court holding that the validity of a state wiretap will be assessed under state law. *United States* v. *Hinton*, 543 F.2d 1002 (2d Cir. 1976); *United States* v. *Capra*, 501 F.2d 267, 275 (2d Cir.), *cert. denied*, 420 U.S. 990 (1974); *United States* v. *Rizzo*, 491 F.2d 215, 217 (2d Cir.), *cert. denied*, 416 U.S. 990 (1974); *United States* v. *Manfredi*, 488 F.2d 588, 598-99 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States* v. *Tortorello*, 480 F.2d 764, 782-83 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973). *But see United States* v. *Marion*, 535 F.2d 697, 702 (2d Cir. 1976), (holding federal law applicable in that case). However, those cases all utilized state law to measure the legality of the state wiretap, not to determine which parties are entitled to contest a federal wiretap in federal court.

Under the pertinent federal cases, from which appellants sought shelter, it is clear that Caruso, Annatone, DiRienzo and Messina may not contest the legality of the federal wiretap by asserting procedural defects in state wiretaps in which they were not overheard. *Alderman* v. *United States*, 394 U.S. 165, 176 (1969); *United States* v. *Wright*, 524 F.2d 1100, 1102 (2d Cir. 1975); *United States* v. *Bynum*, 513 F.2d 533,534-35 (2d Cir.),

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* This reflex comports with the well-settled principle that procedural issues are determined by reference to the law of the forum court. 3, Beale, Conflict of Laws, 1599-1601, 1603 (1935).

cert. denied, 423 U.S. 952 (1975); *United States* v. *Garsilaso De La Vega, supra.*

Even assuming *arguendo*, that New York law were to be applied in determining whether the defendants had standing in federal court, the outcome would not be different. In *People* v. *D'Amico*, 37 App. Div. 2d 730, 323 N.Y.S. 2d 850 (2d Dept. 1971) the Appellate Division made clear that a defendant must have been actually intercepted in order to have standing to object to the use of information obtained through eavesdropping. Recently the New York Court of Appeals has also spoken on this point, stating:

> "Thus for a defendant to establish requisite standing to raise an objection he 'must have been a victim of a search or seizure, or against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.'" *People* v. *Hansen*, 38 NY 2d 17, 22 (1975) (quoting from *Jones* v. *United States*, 362 US 257, 261 (1960).

Clearly the present law of New York is in accord with current federal law. The defendants argue that three recent cases, *People* v. *Brown*, 80 Misc. 2d 777, 364 N.Y.S. 2d 433 (S.Ct. Erie County 1975); *People* v. *Amsden*, 82 Misc. 2d 91, 368 N.Y.S. 2d 433 (S.Ct. Erie County 1975); and *People* v. *Koutnik*, 353 N.Y.S. 2d 197, 44 A.D. 2d 48 (1974), suggest otherwise. However, these cases do not go as far as the defendants would have hoped. All are decisions where state eavesdropping warrants were challenged on the ground that there had been no probable cause supporting initial state wiretaps which formed the sole basis for the later taps. Such is not the case here. Instead we are dealing with

a challenge to federal warrants which were based, only in part, upon state tapes which are not challenged on the basis of defective probable cause but rather on the basis of a sealing delay as to which Judge Pollack found that there was a satisfactory explanation. 18 U.S.C. § 2518(8)(a); CPL § 700.65.

In sum, under federal or state principles of standing only those defendants who were actually intercepted in the state wiretaps may raise the argument that the federal taps were rendered illegal by a delay in sealing the two state taps. Thus, only D'Addario, and Dituri, (Faranda having not appealed) who were intercepted over the "G & D" and "Social Club" wiretaps have the requisite standing to challenge the federal taps on this ground, assuming that such a claim may be made under the federal statute.

POINT IV

Judge Pollack Correctly Found That the Delays in Sealing Were Not Unreasonable.

Finally, even if the claims are cognizable under the federal statute and may be raised by any of the appellants, the motions to suppress were properly denied based on Judge Pollack's findings that the sealing delays were adequately explained. After having heard the witnesses and considered all the circumstances bearing upon the issue, the District Court found, as follows:

> ". . . that the delays in sealing the 'Social Club' tapes were satisfactorily explained, did not derive from any purpose to obtain tactical advantages for the surveilling parties or the State Prosecutor, and no investigative benefits were sought or obtained by the delays. There is no evidence whatsoever of tampering with the tapes

from the date of the termination of the tap until the date of the seal. The delays encountered by the efforts by the Police to ready the tapes for sealing and to duplicate the Social Club tapes and the internal discussions in the District Attorney's Office looking to continuance of the interception adequately explain and sufficiently justify, under the peculiar circumstances, the 24 day delay in sealing the Social Club tapes.

In respect to the G & D tapes, there was a tip-off to the targets of the tap, as the tape apparently confirms, resulting in a decision to te minate that tap before the date to which it had been authorized. The discovery of this misconduct brought on a flurry of excitement and confusion followed by the unexpected hospitalization of the Assistant District Attorney in Charge and ultimately the re-assignment of the case to another Assistant District Attorney. In the course of picking up the threads, the latter discovered that the tapes so terminated had not been sealed and he immediately cured the defect.

While the duration of this sequence of events, 42 days, stretches the time periods of delay in sealing previously held to be satisfactorily explained, every case is *sui generis*. The sealing delay yielded no benefit to the surveilling authorities, was not sought for such a purpose, gave no one any tactical advantage and no tampering was either suspected or hinted or established in the premises by any party." (App. 571-73).

At the outset we note that this case is fundamentally different from *United States* v. *Gigante*, 538 F.2d 502 (2d Cir. 1976) wherein this Court held that the Government's absolute failure to offer any explanation, let alone

a "satisfactory explanation," for sealing delays of between eight and twelve months, required suppression. Further as to one of the tapes in *Gigante*, which was sealed between 6 and 37 days after the expiration of the original order, this Court remanded to the district court for a determination as to whether there was an explanation for the delay. Following the remand, the Government, unlike in this case, found it had no explanation for the delay, and, consequently did not request a hearing.

The Fifth Circuit in *United States* v. *Sklaroff*, 506 F.2d 837 (5th Cir.), *cert. denied*, 423 U.S. 874 (1975) has declared as satisfactorily explained a seven to fourteen day delay because of the need to utilize the original tapes to draft a search warrant. The Court in *Sklaroff*, as did the court below, justified the remaining delay by noting that there was no evidence that the tapes had been altered. More recently, the Fifth Circuit declared the need to transcribe intercepted conversations from original tape recordings satisfactorily explained a sealing delay of five weeks. *United States* v. *Cohen*, 530 F.2d 43, 46 (5th Cir. 1976). Recently Judge Weinfeld in *United States* v. *Esposito*, 76 Cr. 1074 (S.D.N.Y.) (Minutes of Dec. 20, 1976) found the need to duplicate the original tapes to be a "satisfactory explanation" for an eight day delay in sealing.

We note that the defendants rely on a series of New Yorw State cases which stress a strict interpretation of the sealing requirement under Section 700.50(2) of the C.P.L. See *People* v. *Nicoletti*, 34 N.Y. 2d 249, 356 N.Y.S. 2d 855 (1974); *People* v. *Sher*, 38 N.Y. 2d 600, 381 N.Y.S. 2d 843 (1976); *People* v. *Simmons*, 84 Misc. 2d 749, 378 N.Y.S. 2d 263 (N.Y. Sup. Ct. 1975). Cf. *People* v. *Carter*, 81 Misc. 2d 345, 365 N.Y.S. 2d 964 (Nassau Ct. 1975) (excusing an eight day sealing delay for purposes of duplication). While these cases generally find duplication requirements insufficient to

justify a sealing delay, the instant case presented more than mere time needed to duplicate the original tapes. Here Judge Pollack found that with respect to the "Social Club" tapes there were discussions within the District Attorney's office as to whether to continue the interception or employ a different means of electronic surveillance. As to the "G & D" tapes, a most unusual occurrence, the tip-off of the targets of the surveillance, resulted in a flurry of excitement, as well as charges and counter-charges of misconduct. Further complications arose with the unexpected hospitalization of the Assistant District Attorney charged with sealing responsibility and the reassignment of the case to another Assistant District Attorney, who when he discovered the defect immediately had the tapes sealed.

Under these circumstances Judge Pollack's conclusion that there was a "satisfactory explanation" for the 24 and 42 day sealing delays had ample support within the record and was not clearly erroneous.

POINT V

The Affidavits in Support of the Federal Wiretaps Adequately Demonstrated That Normal Investigative Techniques Were Unlikely to Succeed.

Caruso, Annatone and DiRienzo argue that the applications for the federal wiretap orders contained inadequate statements of the investigative procedures "tried and failed or why they reasonably appear to be unlikely to succeed if tried. . . ." 18 U.S.C. § 2518(1)(c).*

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* The other appellants have not briefed this issue, but they joined in it by adoption of all other points in their co-appellants' briefs.

The arguments advanced on this issue overlook the recent opinions of this Court, as well as the pertinent portions of the affidavits which more than satisfy the standards of the statute.

Caruso and Annatone approach this point by arguing that the elements of the crime could have been established by evidence obtained through techniques other than wiretapping. (Caruso and Annatone Br. 38). However, this approach was rejected by this Court in a recent case not cited by defendants, *United States* v. *Hinton*, 543 F.2d 1002 (2d Cir. 1976). Confronted with a similar argument under the equivalent provision of the New York State wiretap statute, N.Y.C.P.L. §§ 700.15(4), 700.(2), this Court stated that:

> "even though state or federal officers may have garnered sufficient information without the use of wiretaps to support an indictment against Matthews, and possibly against a few others, there was every reason to believe that additional co-conspirators were involved who could not be successfully investigated without wiretapping. The order instituting wiretapping was thus not in error." 543 F.2d at 1011.

Here, the affidavits in support of wiretap applications detailed specific grounds for believing that Gaetano Somma, Aldo Mazzarati and Benjamin DeMartino held high positions in the gambling combine and stood to profit the most from its operation. (App. 209). Surveillance placed Somma and Mazzarati in the same premises as Frank Caruso, who held a pivotal management position in the organization. (App. 207). Information furnished by an informant provided a basis for believing that Somma, Mazzarati and DeMartino were at the top of the illegal enterprise. (App. 205, 208). The affidavits further

averred that these potential defendants were insulated from the day-to-day operations making raids, searches and surveillance ineffective against them. (App. 208). As demonstrated by *United States* v. *Hinton*, *supra*, affidavits making this kind of specific showing of the need for electronic surveillance clearly satisfy the statute.

The affidavits further attested to the need for wiretap evidence in view of the informant's fear of testifying, as well as the informant's lack of sufficient information about the higher echelons of the conspiracy. (App. 207). In *United States* v. *Schwartz*, 535 F.2d 160, 163 (2d Cir 1976), also not cited by the defendants, an averment of this nature was found sufficient in itself to meet the requirements of the statute. *See also United States* v. *Steinberg*, 525 F.2d 1126 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3659 (U.S. May 19, 1976); *United States* v. *Esposito*, 76 Cr. 1074 (S.D.N.Y. Dec. 21, 1976) (Weinfeld, *J.*).

While ignoring the recent opinions of this Court, the defendants repeatedly refer to the Ninth Circuit's decision in *United States* v. *Kalustian*, 529 F.2d 585 (9th Cir. 1975), which is readily distinguishable.* The affidavits in that case failed to provide any details demonstrating "why this gambling case presented any investigative problems which were distinguishable in nature or degree from any other gambling case." 529 F.2d at 589. By contrast, the affidavits presented to the District Courts in this case

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* Apart from its inapplicability to this case, *Kalustian* has not been followed by other courts. *See United States* v. *Armocida*, 515 F.2d 29 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975); *United States* v. *Schaefer*, 510 F.2d 1307, (8th Cir.), *cert. denied* 421 U.S. 978 (1975); *United States* v. *Robertson*, 504 F.2d 289 (5th Cir. 1974), *cert. denied*, 421 U.S. 913 (1975); *United States* v. *Fina*, 405 F. Supp. 267 (E.D. Pa. 1975).

specified the targets of the investigation, the bases for believing them to be involved and the particular difficulties encountered in gathering evidence against them.

The defendants launch a further attack on this point by contending that it was somehow dishonest for the Government to seek wiretap authorization on July 11, 1974, and then to apply for a search warrant in mid-October, 1974. Contrary to the defendants' suggestion the applications were not mutually inconsistent.* As Judge Pollack stated:

> "While the affidavit supporting the wiretap order questioned the efficacy of such a search, it neither indicated that a search would be entirely without value nor stated that it would not be performed. Moreover, the affidavit supporting the search warrant did not support that such a search, by itself, could or would produce all the evidence necessary to prove all the elements of the offense against the suspects. Thus, the existence of the subsequent search in no way indicates that traditional investigative techniques would have been adequate to the task at hand." (App. 577).

Finally, in consonance with the claim that the use of a search warrant demonstrates the illegality of the wiretap orders, Caruso and Annatone argue that Title III requires "that the Government demonstrates that all other investigative techniques have been exhausted, or would otherwise prove unsafe or useless. . . ." (Caruso and

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* Appellants contend that the affidavits in support of wiretap orders were later contradicted by the search affidavit. This is simply not so. The fact that the records were easily destroyed did not contradict the later averments that there was probable cause to believe that the records existed.

Annatone Br. 40-41). This proposition was explicitly rejected by this Court when it recently stated its agreement with the view that:

> "the purpose of the statutory requirements is not to preclude resort to electronic surveillance until after all other possible means of investigation have been exhausted by investigative agents; rather, they only require that the agents inform the authorizing judicial officer of the nature and progress of the investigation and of the difficulties inherent in the use of normal law enforcement methods."

United States v. *Hinton*, *supra*, 543 F.2d at 1011. The standard announced in *United States* v. *Hinton*, was more than met here. The affidavits of Special Agent Bonavolonta, in support of the federal warrants, amply demonstated "the difficulties inherent in the use of normal law enforcement methods," justifying the issuance of wiretap orders for this investigation.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

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Peter Sudler, Assistant United States Attorney deposes and says that he is employed in the office of U.S. Attorney ~~the Joint Strike Force~~ for the Southern District of New York.

That on the 10th day of February he served a copy of the within brief on appeal by placing the same in a properly postpaid franked enveloped addressed:

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Peter D. Sudler

Sworn to before me this

10th day of February, 1977

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